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Clerk of the  
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs September 1, 2023

IN RE SKYLITH F. ET AL

Appeal from the Circuit Court for Montgomery County  
No. CC-2020-CV-1735 Kathryn Wall Olita, Judge

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No. M2022-01231-COA-R3-PT

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JEFFREY USMAN, J., concurring.

OPINION

I concur in the majority’s thoughtful and well-reasoned opinion, but I write separately to reflect a variance of view with the majority’s determination as to the appropriate four-month statutory time period for assessing the ground for termination for abandonment by failure to support. In assessing abandonment, the General Assembly has directed Tennessee courts to consider “a period of four (4) consecutive months immediately preceding the filing of a proceeding, pleading, petition, or any amended petition to terminate the parental rights . . .” Tenn. Code Ann. § 36-1-102(1)(A)(i) (West July 1, 2021 to May 8, 2022). The majority concludes that the correct four-month period to examine for the ground of abandonment by failure to support in this case is the four months prior to the granting of the motion to amend, running from July 18, 2021, to November 17, 2021, rather than the four months prior to the time the amended petition was filed on September 24, 2021. I do not necessarily disagree with the majority on this point. Where I respectfully diverge is that I do not think it is necessary to decide between these two time periods in this case and would reserve doing so for a more appropriate case.

In accordance with separation of powers principles, the Tennessee Supreme Court has observed that “[c]ourts are essentially passive instruments of government.’ They do not ‘sit as self-directed boards of legal inquiry and research.’” *State v. Bristol*, 654 S.W.3d 917, 924 (Tenn. 2022) (citations omitted). “[A]n appellate court’s authority ‘generally will extend only to those issues presented for review.’ . . . This ‘principle of party presentation’ is a defining feature of our adversarial justice system.” *Id.* at 923. In the context of parental termination cases, this court’s assigned role is less conventional. In *In re Carrington H.*, the Tennessee Supreme Court held “that in an appeal from an order terminating parental rights the Court of Appeals must review the trial court’s findings as to each ground for

termination and as to whether termination is in the child's best interests, regardless of whether the parent challenges these findings on appeal." *In re Carrington H.*, 483 S.W.3d 507, 525-26 (Tenn. 2016). In parental termination cases in Tennessee, "waiver does not apply in the context of either the grounds for termination or whether termination is in a child's best interest." *In re Aniyah W.*, No. W2021-01369-COA-R3-PT, 2023 WL 2294084, at \*6 (Tenn. Ct. App. Mar. 1, 2023). In performing our charge in accordance with the *Carrington* decision, this court is regularly confronted with a myriad of legal questions ranging across a wide spectrum of levels of difficulty that need be resolved when assessing the grounds for termination and the best interests of the child without legal briefing to identify the full extent of the issues or to assist in the resolution of all matters the court must resolve.

In the present case, none of the parties challenges the four-month period utilized by the trial court in assessing the termination ground of abandonment by failure to support. In performing the charged role of assessing the grounds for termination, the majority understandably, nevertheless, considers what the appropriate four-month time period is for determining abandonment by failure to support in the present case. The majority finds a one-day error by the trial court in terms of the four-month time period that it applied but concludes that this error was harmless.

In reaching this conclusion, as noted above, the majority concludes that the correct four-month period to examine for the ground of abandonment by failure to support in this case is the four months prior to the granting of the motion to amend, running from July 18, 2021, to November 17, 2021, rather than the four months prior to the time the amended petition was filed on September 24, 2021. In this case, the outcome as to the ground for termination does not hinge on whether the four months prior to the filing of the amended petition or the four months prior to the granting of the motion to amend governs. The same result would follow whichever is employed.

The legal question of determining which four-month time period is proper, however, offers some complexity. In arguably analogous circumstances, Tennessee courts have held that the determinative date was that on which a proposed amendment was filed. For example, in *Frazier v. East Tennessee Baptist Hospital, Incorporated*, the plaintiff sued a doctor and hospital for malpractice but voluntarily dismissed the hospital. 55 S.W.3d 925, 926 (Tenn. 2001). The plaintiff later filed a motion to amend and a proposed amendment again asserting claims against the hospital within a year of the voluntary dismissal, but the motion was not granted until after the expiration of the one-year period. *Id.* at 926-27. The Tennessee Supreme Court observed that

when the motion to amend the complaint and a proposed amended complaint are filed prior to the running of the statute of limitations, the motion to amend stands in place of the actual amended complaint while the motion is under review by the court. The fact that an order granting the motion to amend is

entered after expiration of the statute of limitations does not make the amended complaint untimely.

*Id.* at 930. Likewise, in *Salsman v. Texcor Industries, Incorporated*, this court held that “a motion to assert a counterclaim which is pending at the time the plaintiff files a notice of voluntary dismissal is considered a pleaded counterclaim under Rule 41.01(1) where, as here, the motion for leave to amend is later granted.” No. W2001-00730-COA-R9-CV, 2002 WL 1838135, at \*4 (Tenn. Ct. App. July 29, 2002).

Adding to the complexity, when a petitioner files for permission to amend and raises a claim specific to a time period, such as abandonment, he or she is alleging abandonment in the four months preceding the action of filing the amended petition with the court. Unless the petitioner is predicting the future, he or she is not alleging abandonment in the four months preceding the granting of permission to amend, but instead when the petition was filed. The petitioner has no control of when the trial court will act to grant permission to proceed under the amended complaint. Tying the statutory four-month period to the date that the motion to amend is granted could allow a parent who had not paid child support to “repent” in the time between the filing of the motion and the court’s action on the motion, which may be contrary to our statutory scheme. *See* Tenn. Code Ann. § 36-1-102(1)(F) (stating that “[a]bandonment may not be repented of by resuming visitation or support subsequent to the filing of any petition seeking to terminate parental or guardianship rights or seeking the adoption of a child”). Conversely, a parent who was not delinquent in payment at the time of the filing of an amendment could find his or her parental rights subject to termination in connection with the vagaries of the timing of the trial court’s decision on the motion. The present case presents another wrinkle because the trial court, while reserving for another day the question of which is the applicable four-month time period, expressly noted in its order granting permission to amend that the amended petition was “filed with this Court on September 24, 2021,” rather than the date that permission to amend was granted.

The point that I am endeavoring to advance is not that I think the majority has erred. There are a multitude of strong arguments that can be advanced in support of the four-month time period determined to be the appropriate one by the majority. My point is instead that, in performing our unconventional role in the context of parental termination matters, where resolution is unnecessary to our decision, we should reserve unsettled and challenging legal questions for an appropriate case. We should await a case where parties have placed an issue before the court and we have the benefit of their briefing in reaching a decision or a case where the matter must be addressed to perform our responsibility under *Carrington*.

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JEFFREY USMAN, JUDGE